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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 413

**CONTINENTAL OIL COMPANY, A CORPORATION,
PETITIONER**

v.

NATIONAL LABOR RELATIONS BOARD

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE TENTH
CIRCUIT**

SUPPLEMENTAL MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

In its petition for certiorari petitioner urged that the provisions of the Board's order requiring reinstatement of Jones and Moore with back pay were improper because, petitioner asserted, Jones and Moore had both lost their status as employees by obtaining other regular and substantially equivalent employment (Pet. 12, 19-27). In reply to this contention in the brief for the Board in opposition, it was stated, among other things, that (Br. in Opp., p. 7):

This contention was not urged before the Board, although petitioner filed voluminous

exceptions (R. 152-180) to the examiner's intermediate report, which recommended reinstatement with back pay (R. 151). Hence the contention was not properly before the court below. * * *

Petitioner's counsel have by letter called to our attention that petitioner did argue the point in its brief before the Board in support of its exceptions to the examiner's intermediate report. The argument in question was made at pages 144-146 of a 285-page brief, and was inadvertently overlooked in the preparation of the Board's brief in opposition. However, petitioner did not preserve the contention in its exceptions to the examiner's intermediate report, and the Board's Rules and Regulations then in effect (Series 1, as amended, effective April 27, 1936, Article II, Sec. 35), provided that "No matter not included in a statement of exceptions may thereafter be objected to before the Board, * * *." Presumably the omission of any recognition of the contention in question in the Board's decision is attributable to this failure of petitioner to comply with the rules.

In their letter petitioner's counsel also urge that they raised the question in their exceptions to the intermediate report (exceptions 97, 98, 106, and 107, set out at R. 170, 171, 172), and also at the hearing, in objecting to the admission of certain evidence (R. 958 et seq.) Examination of the record references cited fails, however, to reveal any suggestion of the contention in question.

Other objections urged in the brief in opposition against review of the contention are, of course, unaffected by this issue as to whether the contention was raised before the Board.

Respectfully submitted.

FRANCIS BIDDLE,
Solicitor General.

ROBERT B. WATTS,

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OCTOBER 1940.